Supreme Court, U.S.
FILED

No. (1)

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In The Supreme Court of the United States

October Term 1998

STEPHEN A. ARMSTRONG,
Petitioner,

v.

WILLIAM G. BILLINGHAM; JOHN F. DAVIS; LOIS AMES; BARBARA REVES; MARY A. LARKIN; ANTONIA L. PETTIT,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTION PRESENTED

Is compliance with the procedures prescribed by Rule 11 (c)(1)(A) of the Federal Rules of Civil Procedure mandatory prerequisites to granting a motion for Rule 11 sanctions?

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Petitioner, Stephen A. Armstrong respectfully petitions for a writ of certiorari.[1]

DECISIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit (App. 1) is unreported. The opinions and orders for the United States District Court for the Eastern District of Virginia, Alexandria Division relating to FRCP Rule 11 sanctions (App. 5) are unreported. The prior decisions of the United States Court of Appeals for the Fourth Circuit (App. 25, 28) are unreported.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered judgment on November 23, 1998. (App. 1) Jurisdiction of this Court is invoked pursuant to 28 U.S.C § 1254(1).

RULE INVOLVED

Federal Rule of Civil Procedure Rule 11(c)(1)(A) provides, in pertinent part:

> A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subsection (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to

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[1] This Petition is filed by an attorney, *pro se*. For reasons stated, *infra*, summary reversal may be appropriate. However, should the Court grant the Petition in such manner as to call for a full briefing and argument, petitioner has employed counsel to represent him.

the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

STATEMENT

On May 15, 1995,[2] petitioner, as counsel for an individual and two corporate plaintiffs, filed an amended complaint in the United States District Court for the Eastern District of Virginia, Alexandria Division. The 12 count complaint named 25 defendants. Jurisdiction of the district court was invoked pursuant to 18 U.S.C. §§2, *et seq*, 28 U.S.C. §455, *et seq*, 18 U.S.C. §552(a), 18 U.S.C. §641, 18 U.S.C. §§1341, *et* seq, 18 U.S.C. §1503, *et seq*, 18 U.S.C. §§1510, *et seq*, 18 U.S.C. §§1621, *et seq*, 18 U.S.C. §§1952, *et seq,* 18 U.S.C. §§1964, *et seq,* 18 U.S.C. §§2511, *et seq*, 28 U.S.C. §455, §959(b), 28 U.S.C. §1331, 28 U.S.C. §1367, 42 U.S.C §§1985, *et seq.* That action is concluded. This Petition does not involve the merits of that suit.

The district court sanctioned Petitioner and the three plaintiffs, jointly and severally, a total of $104,000.[3] At issue is the validity of an award of approximately $38,000 payable to six defendants.

On July 18, three defendants, Lois Ames, Mary A. Larkin, Antonia L. Pettit, and Anthony Pettit served a proposed Rule 11 sanctions motion on Petitioner. Petitioner, on behalf of all plaintiffs, moved to dismiss three, but neglected to dismiss Anthony Pettit who had not made an yet

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[2] Unless otherwise indicated, all dates are 1995.

[3] The plaintiff's filed and were discharged in bankruptcy, leaving petitioner solely responsible for payment. The individual plaintiff was also sanctioned an additional $100,000.

appearance in the case, on July 28. On July 31, the district court granted the motion filed by petitioner. (App. 36) Notwithstanding that Petitioner had voluntarily moved to dismiss the complaint as to the those three defendants within the 21 day "safe harbor" period provided by Rule 11(c)(1)(A), and that dismissal had been effected during the "safe harbor" period, Lois Ames, Mary A. Larkin, and Antonia L. Pettit filed their previously served sanctions motions on September 14.

On July 19, Billingham and Davis filed separate motions to dismiss. Billingham noticed and set his motion for August 4. Davis noticed and set his motion for August 18. August 10, Billingham filed his motion for sanctions.

August 18, Davis filed his motion for sanctions. Like Reves, neither Billingham nor Davis gave a "safe harbor" notice before filing their motions for sanctions. (App. 38, 40) Reves, who was also dismissed on August 4, filed and mailed a motion for sanctions on July 13. (App. 42) [4] Notwithstanding, the failure of these defendants to comply with Rule 11(c)(1)(A), the district court ruled on October 6 and November 17 that sanctions were to be awarded (App. 15, 17). On December 5, the district court awarded Lois Ames, Anthony J. Pettit, Mary A. Larkin, and Antonia L. Pettit $14,428.49, jointly; Billingham $8,458.16; Davis $19,126.75; and Reves $614.16 (App. 15, 17).

Petitioner appealed to the United States Court of Appeals for the Fourth Circuit on February 6, 1996. The Fourth Circuit dismissed the appeal as untimely on November 18, 1997 (App. 25). Thereafter, on February 17, 1998, the Fourth Circuit granted petitioner's petition for rehearing. (App. 28) It did so because the appeal had been taken improvidently since petitioner's FRCP Rule 59(e) motion, filed in the district court on December 19, 1995, had

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[4] Anthony Pettit, entered the case on August 15th filing both a motion to dismiss and a motion for sanctions.

not been ruled upon. The court of appeals remanded to the district court on February 17, 1998. (App. 28).

Following the Fourth Circuit's remand, the district court denied the Rule 59(e) motion on March 24, 1998, stating, *inter alia* (App. 31):

> Second, he [Petitioner] argues that fee awards for work performed by attorneys other than Glasberg [as to whom petitioner concedes an adequate "safe harbor," notice] should be denied because they did not afford him the 21-day safe harbor protection of F.R.Civ.P. 11(c)(1)(A). The notice that was given even, if by only one defendant, gave adequate notice that sanctions were going to be sought for all defendants. No additional notice was required.[5]

Petitioner again appealed. The Fourth Circuit affirmed, "we affirm the orders on the reasoning of the district court." (App. 3).

REASONS FOR GRANTING THE WRIT

This petition presents important issues concerning the "safe harbor" provisions of Rule 11(c)(1)(A) of the Federal Rules of Civil Procedure that clearly and unequivocally mandate that the party against whom sanctions are sought be served with the sanctions motion at least 21 days before filing the motion, and preclude an award of sanctions if the pleading claimed to be sanctionable is withdrawn during that 21-day period. The district court decision, ratified by the court of appeals, held that service of

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[5] Extracts of the sanctions motions and the "safe harbor" notices are included in the Appendix to show no defendant filed a "safe harbor" notice for the benefit of other parties.

a sanctions motion by any party satisfies the "safe harbor" provision so that other parties need not comply with the 21-day "safe harbor" requirement. (App. 31) In the same vein, the courts below ruled that withdrawal of a pleading (in this case the complaint) by dismissing a party from the case during the "safe harbor" period does not preclude an award of sanctions to the party dismissed from the case during the 21-day "safe harbor" period. The Court of Appeals adopted that meaning[6]

Both the above-stated holdings are so clearly contrary to the plain language of Rule 11 and to the rationale of the reported cases that a grant of certiorari and the unusual step of summary reversal is appropriate. *See e.g., United Food and Commercial Workers v. Four B Corp.*, 893 F. Supp. 980, 987 (D.Kan. 1995), *aff'd* 83 F.3d 433 (10th Cir. 1996) (Rule 11 prohibits filing sanctions motion for 21 days after service to give party time "to correct the challenged action", and where party seeking sanctions does not follow that procedure the "motion for attorneys fees should be denied"); *Sears Roebuck and Co. v. Sears Realty Co., Inc.*, 932 F. Supp. 392, 408 (E.D.N.Y. 1996) (where sanctions motion "does not comply with straight forward procedural requirements" that it be served 21 days before filing and is not filed separately it "must be denied", and if "objectionable contention is corrected or withdrawn [during 21 day period] "the motion should not be filed with the court"); *Tate v.Tau*, 865 F. Supp. 681, 691 (D. Nev. 1994) ("motion for sanctions cannot be filed until at least 21 days after being served"); *Bowler v. U.S. I.N.S.*, 901 F. Supp. 597, 604 (S.D.N.Y. 1995) ("Under Rule 11(c)(1)(A), a party may move for sanctions, but the non-moving party *must* be given twenty-one days to withdraw or correct the challenged paper"

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[6] The Fourth Circuits decision, at odds with the plain language of Rule 11 and all prior precedent, while unpublished had presidential value, *infra*..

(emphasis added)); *Brown v. Pierce Mfg., Inc.*, 169 F.R.D. 118, 119 (E.D. Wis. 1996) (party seeking sanctions must first serve motion without filing it, and "[i]f, *but only if*, the opposing party does not withdraw the objectionable filing within 21 days... the party may file its sanctions motion" (emphasis added)); *Thomas v. Treasury Management Ass'n., Inc.*, 158 F.R.D. 364, 369 (D.Md. 1994) ("21-day waiting period before filing a motion for sanctions is absolutely perquisite", and "failure to give that [21-day] notice and to afford Plaintiff's counsel the benefit of the safe harbor provision of Rule 11(c)(1)(A) suffices to preclude its claim for sanctions.")

Rule 11 was amended, effective December 1, 1993, to reduce the burden of sanctions claims. The "safe harbor" provision gives an absolute right to correct or withdraw an otherwise sanctionable pleading. It makes no sense, as the courts below did here, to say that service of a motion by one party meets the service requirement for all parties. That is so because a claim made against a particular party may be sanctionable, while that against another party may not. Therefore, before a party may be awarded sanctions that party must comply with the provisions of Rule 11(c)(1)(A). The district court's ruling holding (App. 30), adopted by the court of appeals (App. 1), defeats the very purpose of the "safe harbor" provision.

Similarly, it is absolutely contrary to Rule 11 to impose sanctions for a pleading that was withdrawn or dismissed during the 21-day "safe harbor" period. The district court did just that, and the Fourth Circuit affirmed. The sanctions motion was served on behalf of Lois Ames, Mary Larkin, and Antonia Pettit. The case against them was voluntarily dismissed on July 31, well within the 21-day period. Further, after admitting they were timely dismissed out, they filed a motion for sanctions. The claimed sanctionable pleading (the complaint) thus, under Rule 11, no longer could be the basis of sanctions. It was plain error

to impose sanctions for the voluntarily dismissed complaint. Rule 11(c)(1)(A) prohibits the filing of the motion (and therefore sanctions) if "the challenged paper . . . is not withdrawn." [7]

The other respondents failed to follow the mandated procedure in Rule 11(c)(1)(A). None of them served the "safe harbor" notice/motion 21 days before filing their motion for sanctions. Thus, their filing, without following the "safe harbor" procedure were ineffective to empower the district court to grant sanctions to them. The language of Rule 11(c)(1)(A) is mandatory, not permissive. The Rule states that the motion

> "**shall be** served as provided in Rule 5, but **shall not be** filed with or presented to the court unless, within 21 days after service of the motion ..., the challenged paper,... is not withdrawn or appropriately corrected. [emphases added]

"Shall" and "shall not" are plainly mandatory language which the courts below were not authorized to ignore. For reasons stated, *supra,* the compliance with the proper procedure by some defendants, could not apply to all defendants. The attempts by the district court in its orders of December 5, 1995 (App. 15, 17) and March 24, 1998 (App. 30) to bootstrap its positions were unavailing. It was plain error to hold that notice by any defendant was sufficient to cure Rule 11(c)(1)(A) violations by the respondents.

This petition presents the issue which other Circuit Courts of Appeals have narrowly construed in favor of the

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[7] The 1993 amendment eliminated sanctions for a case voluntarily dismissed during the "safe harbor" period. Prior to the 1993 amendment, voluntary dismissal did not insulate the filer of the pleading from Rule 11 sanctions. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990).

Rule 11 respondent. The Fourth Circuit Court of Appeals decision is at odds with the plain language of Rule 11 and all prior precedent. While unpublished, the Fourth Circuit decision does have presidential value. The Fourth Circuit Rule 36(c) provides for citation of unpublished opinions if there is no published precedent. The Fourth Circuit has not addressed the issue here presented in any of its published opinions. Thus, that decision is the rule of the circuit. Fourth Circuit Rule 36(c) provides, in relevant part:

> If counsel believes...that an unpublished disposition of any court has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited...

See also, *Jones v. Superintendent, Virginia State Farm,* 465 F.2d 1091, 1094 (4th Cir. 1972).

IV. CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

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